FILED
SEP 4 1991
OFFICE OF THE CLERK

No. 91-31

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

GIUSEPPE GAMBINO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-31

UNITED STATES OF AMERICA, PETITIONER

v.

GIUSEPPE GAMBINO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

---

1. In our petition, we asked the Court to hold this case pending its disposition of *United States* v. *Felix*, No. 90-1599. Respondent argues that this case should not be held for *Felix*, because this case, unlike *Felix*, involves "successive conspiracy prosecutions where the conduct used to infer the essential element of an agreement is precisely the same in both prosecutions." Br. in Opp. 17.

The fact that *Felix* involved a conspiracy prosecution following a substantive prosecution, while this

case involves successive conspiracy prosecutions, does not distinguish the legal issue presented in the two cases. In each case, the court of appeals held that the "conduct" at issue in a conspiracy prosecution, for purposes of applying this Court's holding in *Grady* v. *Corbin*, 110 S. Ct. 2084 (1990), consists of the actions of the defendant from which the government asks the jury to infer the conspiracy. Applying that principle, the Tenth Circuit in *Felix* held that the conduct charged in an indictment for conspiracy was the same as that which had been charged in a prior prosecution on a substantive charge, while the Second Circuit in this case held that the conduct charged in an indictment for conspiracy was the same as that charged in a prior prosecution on a conspiracy charge. Because both courts appealed to the same underlying principle—a principle that in our view is inconsistent with settled law concerning the crime of conspiracy and the application of the Double Jeopardy Clause—this Court's disposition of *Felix* is likely at least to shed substantial light on the resolution of this case.

2. Petitioner also asserts that the issues in this case are "much more limited" than those in *Felix*. Br. in Opp. 17. To be sure, the court of appeals in *Felix* barred prosecution on both conspiracy and substantive charges, while the court of appeals in this case barred prosecution on only a conspiracy charge. Thus, *Felix* does involve questions not presented by this case concerning the application of the Double Jeopardy Clause to successive prosecutions on substantive charges. Nonetheless, that fact does not suggest that this case should not be held pending this Court's disposition of *Felix*. As argued above, one of the questions presented in *Felix* is raised here as

well, and it is therefore appropriate to hold this case pending disposition of *Felix*.*

Respectfully submitted.

KENNETH W. STARR
Solicitor General

SEPTEMBER 1991

---

* Petitioner asserts that "unlike the instant case, *Felix* is concerned with the principles of collateral estoppel as indicated in *Ashe* v. *Swenson*, 397 U.S. 436 (1970) and that decision's interrelationship to *Grady*." Br. in Opp. 17. The collateral estoppel doctrine applies only where an issue of fact has been decided in a prior proceeding in favor of the party invoking the doctrine. See *Dowling* v. *United States*, 110 S. Ct. 668, 673-674 (1990). Since the defendant in *Felix* was convicted in his prior prosecution, no issue of fact can be said to have been decided in his favor in that proceeding. Consequently, the collateral estoppel doctrine has no application in *Felix*.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 45056